Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991	)))))	CG Docket No. 02-278

Comments of Joe Shields on The Northstar Alarm Services LLC Petition For Expedited Declaratory Ruling on Soundboard Technology

Once again a TCPA violator is asking the Commission to improperly interfere in legitimate litigation and the judicial process. The petitioner Northstar Alarm Services LLC (hereinafter "Northstar") made prerecorded telemarketing calls en masse to landline telephone numbers without the prior express written consent of the called parties. See *Braver et al. v. NorthStar Alarm Services LLC*, 5:17-cv-00383 (W.D. Okla., 2017) (hereinafter "Braver v Northstar").

The sought declaratory ruling will not terminate a controversy or remove any uncertainty. See 47 C.F.R. §1.2. Petitioner has failed to provide any evidence that a controversy or uncertainty exists. What the petitioner seeks is protection from liability for violating the TCPA. The Commission cannot retroactively change its rules to limit liability of the petitioner. "The defendants have not

offered any evidence or argument to suggest that if the FCC were to change its position that change would apply retroactively to the pending litigation." *Jamison v. First Credit Services, Inc.*, Dist. Court, ND Illinois 2013.

Nowhere in the Commission's rules, in the TCPA or in any federal law is there a mandate that would support or direct the Commission to issue a declaratory ruling that would improperly interfere with and thwart litigation that has legal merit! The petition is nothing more than a brazen attempt to create a loophole for prerecorded voice message calls in the TCPA.

In granting class certification in *Braver v Northstar* the court found that the defendant Northstar had hired a company by the name of Yodel Technologies LLC to make telemarketing calls that delivered prerecorded messages to call recipients without prior express written consent[1].

The prerecorded message calls were made to a list of telephone numbers purchased from Red Dot Marketing Solutions LLC. The petitioner admitted to the court that: "Prior to initiating the telemarketing campaign, defendants understood that these persons had not consented to receive

[1] See also *Keith Hobbs and Terry Fabricant v. Randall-Reilly, LLC and Yodel Technologies, LLC,* Case No.: 4:19-cv-00009 (D.C. M.D.of.G, Columbus Div. 01-22-2019) which was filed based on the same or similar violations of the TCPA.

prerecorded calls…" See *Braver et al. v. NorthStar* Order Certifying Class Including Findings of Fact and Conclusions of Law. A copy of that Order is included with my comments.

The petitioner makes a nonsensical claim in support of its petition! No live person introduced the initial prerecorded message made en masse to every telephone number on the purchased list. The fact that more than one prerecorded messages was delivered during the same call does not make the prerecorded message(s) legal under the TCPA. Quite the contrary, every call recipient when initially responding to the call was subjected to the exact same prerecorded message in violation of the TCPA[2].

The Federal Trade Commission has addressed soundboard technology telemarketing calls in 2009 and again in 2016. Ultimately, the FTC found that telemarketing calls using soundboard technology are subject to the general prohibition placed on traditional robocalls[3]. The 2016 FTC letter states:

> "A fundamental premise of [the] September 2009 letter was that soundboard technology was a surrogate for the live agent's actual voice. A human being cannot conduct separate conversations with multiple consumers at the same time using his or her own voice. Nonetheless, some companies are routinely using

[2] "Hello this is Amy, I am security advisor, can you hear me okay?" *Braver v NorthStar Order Certifying Class*

[3] The Commission should not create a conflict with FTC rules and regulations.

> soundboard technology in precisely this manner [of enabling an agent to handle multiple simultaneous calls] . . . Indeed, Call Assistant noted publicly that one of the advantages of its technology is that an agent can conduct multiple calls simultaneously."
>
> "Given the actual language used in the TSR, the increasing volume of consumer complaints, and all the abuses we have seen since we issued the September 2009 letter, we have decided to revoke the September 2009 letter. It is now staff's opinion that outbound telemarketing calls that utilize soundboard technology are subject to the TSR's prerecorded call provisions because such calls do, in fact, "deliver a prerecorded message" as set forth in the plain language of the rule."

The goal of the 2016 informal letter was upheld by a Federal district court and on appeal by the District of Columbia Appellate Court. The FTC's policy was effective May 12th 2017. A copy of the FTC 2016 letter is included with my comments.

The petitioner is creating faux issues. A request to stem a self-serving false claim of a rising tide of professional litigants amounts to a request that the Commission interfere with the judicial process. This faux issue lies properly with the courts to address and they have addressed this faux issue on numerous occasions to the detriment of the petitioner.

Granting petitioners request for a declaratory ruling will not stem a self-serving false claim of a rising tide of professional litigants. The Commission cannot create a rule that only naïf consumers can sue for TCPA violations.

More importantly, the Commission chairman should not be encouraging industry to violate the TCPA under the guise that the TCPA is a poster child for lawsuit abuse. No such abuse exists! The Commission chairman has obviously fallen for the lawsuit abuse lies perpetrated by special interests group such as banks, debt collectors and poll takers.

The petitioner thinks the Commission can prevent class action litigation! "…in order to establish a baseline national standard that prevents the use of class action litigation…" The petitioners assumption is absurd. Just as absurd is petitioners claim that consumers are being hurt by class action litigation.

Obviously the TCPA is working as it was envisioned by Congress. Evidence of the success of TCPA lawsuits is that key players from every possible industry are lobbying the Commission to relax TCPA regulations so that those industries can carry on as usual with little fear of consumer lawsuits.

Class action TCPA law suits have led to increased awareness of the illegal behavior of legitimate companies in regards to their callous and indifferent treatment of consumers. "if class actions can be said to have a main point, it is to allow the aggregation of many small claims that would otherwise not be worth bringing, and thus to

help deter lawless defendants from committing piecemeal highway robbery, a nickel here and a nickel there, that adds up to real money, but which would not be worth the while of an individual plaintiff to sue on." *Miller v. McCalla*, 198 F.R.D. 503, 506 (N.D. Ill. 2001).

Prior to the petitioner citation in support of its false claim of litigation abuse[4], the court found that the plaintiff was not outside the zone of interest: "Here, Defendant has proffered no evidence that 972-943-9799 is a residential telephone number Plaintiff maintains purely for the purpose of filing TCPA lawsuits as in in *Telephone Science Corporation* and *Stoops* or described facts sufficiently similar to such cases." *Morris v UnitedHealthcare Ins. Co.*, 4:15-cv-00638-ALM-CAN, 2016 U.S. Dist. LEXIS 168288, 2016 WL 7115973, at *6 (E.D. Tex. Nov. 9, 2016).

The full sentence the petitioner should have provided the Commission states: "But further notes that TCPA suits have, in many instances, been abused by serial litigants; and going forward each such case merits close scrutiny on the issue of standing in light of *Spokeo*."

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In *Morris v. Hornet Corp.*, No. 17-0350, 2018 U.S. Dist. LEXIS 170945 (E.D. Tex. Sept. 14, 2018) the court held: "Finding that the plaintiff had standing even though he was "seasoned" and "primed and ready" to take telemarketers to court if they violated the TCPA and stating that a plaintiff's privacy interests did not "cease to exist merely because he realized that he could profit from suing for their invasion." *Morris v. Hornet Corp.* citing *Cunningham*, 251 F. Supp. 3d at 1195.

The same court also stated: "Defendant seems to take issue with the fact that Plaintiff has a higher than average understanding of the TCPA and how to recover under the statute. Despite this fact, Plaintiff has not lost his right to privacy as protected by the TCPA. Indeed, as the aforementioned courts have held, such factors do not strip a plaintiff of standing." *Id.*

There are other cases that address the faux issue of professional plaintiff: *Cunningham v. Florio*, No. 17-0839, 2018 WL 4473792 (E.D. Tex. Aug. 6, 2018); *Cunningham v. Rapid Response Monitoring Services, Inc.*, 251 F. Supp. 3d at 1197. *Fitzhenry v. ADT Corp.*, 2014 WL 6663379, at 6 (S. D. Fla. Nov. 3, 2014) "Defendants have not cited any authority for the proposition that a professional plaintiff is outside of the TCPA'S statutory zone of interest." See

also *Abramson v. Oasis Power LLC*, (Dist. Court, WD Pennsylvania 2018) "…the Court rejects any suggestion that Abramson's prolific history of filing TCPA lawsuits distinguishes this case and demonstrates the lack of an injury-in-fact. As another judge in this District recently ruled in denying a similar motion to dismiss a TCPA case filed by Abramson, Abramson's "pursuit of his rights under the Act in other lawsuits" does not "negate the existence" of an otherwise concrete and particularized injury-in-fact based on intrusion upon the litigant's rights to privacy and seclusion. *Abramson v. CWS Apt. Homes, LLC,* No. 16-426, 2016 WL 6236370, at * 3 (W.D. Pa. Oct. 24, 2016).

in *Cunningham v. Rapid Response Monitoring Services*, 251 F. Supp. 3d 1187 (Dist. Court, MD)the court found:

> "Nothing in the Constitution, though, requires a plaintiff to be a naïf. Litigation is not college athletics: there is no "amateurs only" rule. See Murray v. GMAC Mortg. Corp., 434 F.3d 948, 954 (7th Cir. 2006) ("What the district judge did not explain, though, is why `professional [plaintiff]' is a dirty word. It implies experience, if not expertise. The district judge did not cite a single decision supporting the proposition that someone whose rights have been violated by 50 different persons may sue only a subset of the offenders."). Nor is there anything out of the ordinary or constitutionally suspect about a plaintiff's being motivated by the prospect of reaping a reward rather than simply vindicating or receiving restitution for his constitutionally sufficient injury. The statutory damages available under the TCPA are, in fact, specifically designed to appeal to plaintiffs' self-interest and to direct that self-interest toward the

> public good: "like statutory compensation for whistleblowers," they "operate as bounties, increasing the incentives for private enforcement of law." Arnold Chapman & Paldo Sign & Display Co. v. Wagener Equities Inc., 747 F.3d 489, 492 (7th Cir. 2014). Designing a cause of action with the purpose of enlisting the public in a law's enforcement scheme is a well-established tool that can be found in areas ranging from antitrust and civil rights law to environmental law and false claims.

As the Commission can easily see a professional plaintiff is not a bad thing as the petitioner claims. In fact exactly the reverse is true. Professional plaintiff's put teeth into the TCPA. See Erienet, Inc. v. Velocity Net, Inc., 156 F.3d 513 (3rd Cir.1998). "private enforcement provision [in the TCPA] puts teeth into the statute ..."

The court in *Braver v Northstar* firmly rejected the very same professional plaintiff argument made by Northstar in their petition. "Braver's own experience in litigating TCPA matters and his knowledge of the TCPA speak to his ability to vigorously advocate on behalf of the class. His understanding of many of the technical aspects of this case, as was plainly evident at the hearing, is impressive." In addition the court stated: "The fact that Braver has previously pursued TCPA claims and lawsuits is not disqualifying."

The petitioner needs to review the concept of Private Attorney General which the highest court in the land has recognized. "The United States Supreme Court noted that

when a plaintiff brings an action under the Civil Rights Act and obtains an injunction, he does so not for himself alone but also as a private attorney general, vindicating a policy that Congress considered of the highest priority. *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402, 88 S.Ct. 964, 966, 19 L.Ed.2d 1263 (1968).

The Supreme Court has held that it and other federal courts ***have repeatedly held*** that individual litigants, acting as private attorneys general, have standing as "representatives of the public interest." *Flast v. Cohen*, 392 U.S. 83, 120 (1968). The court in *Red Bull Ass'n v. Best Western Int'l*, 686 F.Supp. (S.D. N.Y. 1988) noted in the context of the fair housing law, that "the person on the landlord's blacklist is not the only victim of discriminatory housing practices; it is ... the whole community."

Getting back to the soundboard petition a case that is on point on consent for soundboard prerecorded message calls is *Margulis v Eagle Health Advisors LLC*, 2016 Westlaw 1258640 (E.D. Mo. 2016) where the court held that consent cannot be obtained during a soundboard telemarketing call. "The Court notes however that a similar argument was rejected in Margulis v. P & M Consulting, Inc., 121 S.W.3d 246, 251 (Mo. Ct. App. 2003). There, the court ruled that plaintiff's responses to questions posed to her after the

call was connected to her residential telephone line did not constitute express consent given prior to the initiation of the call." Consequently, the court found that the soundboard prerecorded message call was a violation of the TCPA[5].

The *Margulis* decision was decided three years ago. Obviously, the petitioners claim that federal courts require clarifying guidance is a red herring. The petitioner is obviously not telling the Commission the whole story – only its self-serving fable. The petitioner is claiming that a soundboard prerecorded message is not a prerecorded message because the prerecorded message is delivered in pieces. That conclusion is absurd! Seriously, when is a prerecorded message not a prerecorded message? The answer should be obvious to everyone!

I have personally been subjected to dozens of soundboard robocalls. Never has a live person answered my questions or my attempts to interrupt the prerecorded snippets. The scripted messages were so off base that it was easily discernable that a natural conversation with a human was not occurring.

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[5] Plaintiff alleges upon information and belief that Defendants' call to his residential telephone line utilized technology described as a "telemarketing robot," "agent assisted automation technology," "voice conversion technology," "outbound IVR," or "cyborg telemarketing."

I remind the Commission that a similar petition was filed with the Commission by Call Assistant LLC after the 1st FTC opinion letter. The Commission entertained comments and reply comments under DA 12-1654. The petition was withdrawn after comments and reply comments had been submitted wasting everyone's time. The current petition is almost verbatim of the Call Assistant LLC petition except for the FTC letters which have been intentionally omitted by the petitioner.

If petitioner calls fall under live calls, as the petitioner would have the Commission believe, then the calls must connect to a live person. Since petitioner's calls do not connect to a live person (petitioners calls are all initially connected to a "intro" prerecorded message) then petitioner's calls fall under the prerecorded message regulations of the TCP[6]. Consequently, clarification is not warranted.

The public wants the Commission to fix the robocall epidemic. Many people have stopped answering their cell phones because of the barrage of robocalls from banks, debt collector, political entities, survey companies and scammers. The Commission should be protecting consumer

[6] "…the fact that some calls may have included live voices, at some stage, does not defeat any of the elements of the claim." *Braver v Northstar*

privacy and our communications network from those that have no respect for either. The Commission can protect consumer privacy and the communications network by stemming the tsunami of robocalls the public is besieged with. The Commission can start doing so by denying the Northstar petition.

The Commission must take affirmative action to reduce the tsunami of robocalls the public is besieged with. The Commission must firmly reject and deny the petition[7].

Respectfully submitted.

_____/s/_____

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[7] The Commission in addition to denying the petition should issue a citation to the petitioner for the unwanted and unauthorized neighbor spoofed robocalls based on the evidence and findings in the *Braver* court.

Braver v Northstar Order Certifying Class With Findings of Fact and Conclusions of Law

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

ROBERT H. BRAVER, for himself and all individuals similarly situated, Plaintiff, -vs- NORTHSTAR ALARM SERVICES, LLC, a Company, et al., Defendants.	)	Case No. CIV-17-0383 -F

ORDER CERTIFYING CLASS, INCLUDING FINDINGS OF FACT AND CONCLUSIONS OF LAW

Before the court is plaintiff Robert H. Braver's motion for class certification of the claim alleged in count one of the first amended complaint.[1] Doc. no. 42. Count one alleges that defendants' robocalls delivered a prerecorded telemarketing message without plaintiff's or the class members' prior express written consent, in violation of the Telephone Consumer Protection Act (TCPA, or the Act), 47 U.S.C. §227(b), and 47 C.F.R. § 64.1200(a)(3).

An evidentiary hearing was held on the motion on June 8, 2018. At the conclusion of the hearing the court requested supplemental briefing along with

[1] The first amended complaint was deemed further amended by the court (see doc. no. 54) after the parties stipulated to the dismissal of count two. Accordingly, count two is no longer alleged. Class certification has not been sought with respect to count three.

proposed findings of fact and conclusions of law. The briefing is complete, and the motion is ready for determination.[2]

Part I, the introduction to this order, reviews some of the general allegations, sets out the statute and regulation upon which count one depends, and describes the class and sub-class proposed by the plaintiff. Part II states the court's findings of fact. Part III states the court's conclusions of law. When it serves readability to do so, some fact-findings have been included in the conclusions of law portion of this order. To the extent that any matters have been characterized as conclusions of law when they are more accurately characterized as findings of fact, they should be so regarded. The court's findings and conclusions support certification of the proposed classes, which are described in Part IV. The schedule, going forward, is addressed in Part V.

I. Introduction

A. General Allegations

Plaintiff Robert H. Braver, individually and on behalf of all others similarly situated, brings claims against defendants, Northstar Alarm Services, LLC ("Northstar") and Yodel Technologies, LLC ("Yodel"), seeking to recover statutory damages based on defendants' alleged violations of the TCPA.

The first amended complaint alleges that Northstar hired Yodel to initiate telemarketing calls advertising Northstar's home security systems. Doc. no. 7, ¶ 2. Plaintiff alleges that Yodel initiated thousands of calls marketing Northstar's home security systems to residential telephone numbers using a prerecorded voice without express written consent, including calls to plaintiff's home telephone number, in

[2] The briefing includes the motion (doc. no. 42); NorthStar's response brief (doc. no. 57); Yodel Technologies' response brief (doc. no. 59); Braver's reply brief (doc. no. 62); Braver's supplemental brief (doc. no. 69); and Northstar's supplemental brief (doc. no. 71). The hearing transcript is at doc. no. 67.

violation of the TCPA, 47 U.S.C. § 227(b)(1)(B). *Id.* at ¶¶ 2, 3, 18, 22, 34. Plaintiff alleges that the defendants concealed their identities by spoofing phone numbers on caller IDs and using fictitious business names until consumers expressed enough interest in Northstar's goods and services to be transferred to a live representative. *Id.* at ¶¶ 19, 20, 21, 23, 24, 25, 26. Plaintiff alleges that Northstar is vicariously liable for Yodel's conduct. *Id*. at ¶¶ 36-42. [3] Plaintiff and class members seek statutory penalties from $500 to $1500 per violation for defendants' willful violation of the TCPA. *Id.* at ¶¶ 60-62.

B. The Statute and the Regulation Upon Which Count One Depend

Title 47 U.S.C. § 227(b)(1)(B) makes it unlawful "to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party."

Federal Communications Commission regulations promulgated under the TCPA include 47 C.F.R. § 64.1200, addressing delivery restrictions on telephone calls including "telemarketing" calls.[4] Subsection (a)(3) of § 64.1200 requires that consent for "telemarketing" calls must be "prior express written consent."[5]

The term "prior express written consent" is defined in the regulation as follows.

> [A]n agreement, in writing, bearing the signature of the person called that clearly authorizes the seller to deliver or cause to be delivered to the person called advertisements or telemarketing messages using an automatic telephone dialing system or an artificial or prerecorded voice,

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[3] The court previously dismissed any direct liability claims alleged against NorthStar, after plaintiff confessed that issue. Doc. no. 27, p. 7.

[4] "The term "telemarketing" means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person." 47 C.F.R. § 64.1200(f)(12).

[5] The regulation states that except in situations not material here, "No person or entity may…[i]nitiate any telephone call to any residential line using an artificial or prerecorded voice to deliver a message without the prior express written consent of the called party…." 47 C.F.R. § 64.1200(a)(3).

> and the telephone number to which the signatory authorizes such advertisements or telemarketing messages to be delivered.
>
> (i) The written agreement shall include a clear and conspicuous disclosure informing the person signing that:
>
> (A) By executing the agreement, such person authorizes the seller to deliver or cause to be delivered to the signatory telemarketing calls using an automatic telephone dialing system or an artificial or prerecorded voice; and
>
> (B) The person is not required to sign the agreement (directly or indirectly), or agree to enter into such an agreement as a condition of purchasing any property, goods, or services.
>
> (C) The term "signature" shall include an electronic or digital form of signature, to the extent that such form of signature is recognized as a valid signature under applicable federal law or state contract law.
>
> 47 C.F.R. § 64.1200(f)(8).

C. Class and Subclass Requested for Certification

The motion seeks certification of a national class and sub-class pursuant to Fed.R.Civ.P. 23(a) and (b)(3), defined as follows.

> Class:
>
> All persons in the Red Dot Data marketing list for whom Yodel's records reflect a telephone call regarding Northstar's home security systems that lasted more than 30 seconds, that was handled by an agent who applied status code 20[6] or 50[7] to the call, and that resulted in the normal clearing disposition.[8]

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[6] Status Code 20 means that the called party responded to the prerecorded prompts by stating that they did not want to be called again. Doc. no. 42-11, pp. 32-33.

[7] Status Code 50 means that the soundboard agent played at least six prerecorded message prompts during the call, *i.e.* up to the prerecorded question "Are you a U.S. citizen?" Doc. no. 42-11, pp. 34-35.

[8] "Normal clearing" indicates successful call completion to the called party. Doc. no. 42-4, p. 63.

Subclass:

All persons in the Red Dot Data marketing list for whom Yodel's records reflect a telephone call regarding Northstar's home security systems that lasted more than 30 seconds, that was handled by an agent who applied status code 50 to the call, and that resulted in the normal clearing disposition.

Excluded from the class are:

Any persons whose contact information is associated with either an IP address or website URL in the Red Dot Data marketing list.[9]

II. Findings of Fact

Northstar is in the business of providing security and home automation systems to home owners across most of the country. Doc. no. 69-1 at 23:9-11.[10]

In January of 2016, Northstar hired Yodel to place "soundboard" or "avatar" telemarketing calls on its behalf in order to sell home security systems. Doc. no. 42-3 at 31:7-10, 67:2-24; 42-4 at 16:617, 53:2-23, 55:6-17; doc. no. 42-5 at 98:18-24.

During these calls, "soundboard agents" played prerecorded audio files, in a scripted sequence, to the recipient. Doc. no. 42-5 at 97:14 – 98:1. The standard script (with each numbered paragraph representing a separate prerecorded audio file) begins as follows.

1. Intro: Hello this is Amy,[11] I am security advisor, can you hear me okay?
2. Purpose: Okay, good, I am with the security help center and the reason why I am calling today is that there have been issues with false alarms, with

[9] Because a few of the Red Dot Data records display an IP address or URL of a marketing website which one of the leads (sales leads, *i.e.* persons called) might have visited, and which might have displayed terms and conditions requiring consent to telemarketing calls, the proposed class definition excludes persons whose contact information, as shown in the records, is associated with either an IP address or a website URL, in an effort to preempt consent arguments.

[10] Depositions transcripts are cited by page number. Except when citing deposition transcripts, this order cites ecf page numbers.

[11] During the class period, the name and voice in the recordings changed but otherwise the script remained largely unchanged.

home security systems in your neighborhood, have you been informed about that?

3. Security Concern: With crime rates and mass shooting on the rise in the US and national security with our borders, you can see having false alarms with home security systems in your area can be a big concern right?

4. My job: So it's my job to make sure that all the homes in your neighborhood are aware of the technologies and security programs available in your area, I just have a couple of questions to see what your home will qualify for. Are you the homeowner? . . .

Doc. no. 42-1.

These calls were placed to persons with whom the defendants had no prior relationship. Doc. no. 42-4 at 18:8-19:6. Defendants purchased the class members' telephone numbers from a data vendor, Red Dot Data, which sells the landline telephone numbers, names, and addresses of homeowners across the country. *Id.* at 18:2-19:6, 24:24-25:12.

Prior to initiating the telemarketing campaign, defendants understood that these persons had not consented to receive prerecorded calls, but purportedly believed that they did not need consent to call landline telephone numbers. *Id.* at 25:20-26:12.

The soundboard dialing system caused an invalid telephone number, which began with the same area code as the telephone number dialed, to display on the recipient's caller ID. Doc. no. 42-2 at ¶¶ 36- 44; doc. no. 42- 5 at 87:9-19.

Plaintiff received two of these calls on August 26, 2018. Doc. no. 42-13 ¶¶3-5; doc. no. 42-14.

The soundboard dialing system generated records of these calls. Doc. no. 42-4 at 57:358:6; doc. no. 42-22. The call records identify, among other things, the number dialed, the number displayed on the caller ID, the date and time of the call,

the duration of the call,[12] the telephone network's disposition of the call, and the soundboard agents' treatment of the call via "status codes." Doc. no. 42-2 at p. 9, ¶ 27; doc. no. 42-4 at 59:1-19, 61:8-9, 62:15-20, 63:10-19, 66:22-67:16, 68:15 – 69:7, 69:17-70:9; doc. no. 42-5 at 83:6-10.

As previously stated, the proposed class is limited to calls resulting in status codes 20 or 50. Status code 20 means that the called party responded to the prerecorded prompts by stating that they did not want to be called again. Status code 50 means that the soundboard agent played at least six prerecorded prompts during the call. *See*, doc. no. 42-11 at 26:10-27:19, 32:25-33:2, 34:2-35:15.

Each one of these call records corresponds to a lead in the Red Dot Data marketing list. Doc. no. 42-22; doc. 42-4 at 59:1-19.

Plaintiff's expert, Robert Biggerstaff, analyzed the call records and marketing list and identified 239,630 persons (leads), and 252,765 calls to those persons, which fall within the parameters of the class definition. Doc. no. 42-2 at pp. 9-10 ¶¶ 32-33; doc. no. 67, TR at 89:1 – 90:14. He found that 47,398 persons (leads), and 54,204 calls to those persons, fall within the parameters of the sub-class definition. Doc. no. 42-2 at p. 10 ¶ 33.

III. Conclusions of Law

A. Personal Jurisdiction

Defendants argue that the court lacks personal jurisdiction over the defendants, relying on Bristol-Myers Squibb Co. v. Superior Court of California,

[12] Yodel's Rule 30(b)(6) witness testified at his deposition that it typically takes about 5 to 6 seconds after connection before the soundboard agent plays the first prerecorded prompt in the script. Doc. no. 42-11 at 71:9-19.

___ U.S. ___, 137 S. Ct. 1773 (June 19, 2017). The court disagrees for the reasons stated below.

Defendants have waived this argument by (1) failing to raise it in either their answers or motions to dismiss, and (2) admitting personal jurisdiction in the joint status report filed with the court.[13] Defects in the district court's personal jurisdiction over a party are waived unless timely raised in a pre-answer motion or in the answer. Williams v. Life Sav. & Loan, 802 F.2d 1200, 1202 (10th Cir. 1986), citing Fed. R. Civ. P. 12(h)(1). *And see*, Sobol v. Imprimis Pharmaceuticals, 2018 WL 2424009, **2-3 (E.D. Mich. May 29, 2018) (rejecting argument that Bristol-Myers was an intervening change in the law which permitted defendants to raise the personal jurisdiction issue for the first time after failing to raise it in their answer).

In addition, defendants' reliance on Bristol-Myers is misplaced. This court joins the majority of other courts in holding that Bristol-Myers does not apply to class actions in federal court. *See, e.g.*, Casso's Wellness Store & Gym, LLC v. Spectrum Lab. Prods., Inc., 2018 WL 1377608, at *5 (E.D. La. Mar. 19, 2018) (TCPA case; noting "the lack of federalism concerns in federal court" in TCPA class action); Sanchez v. Launch Tech. Workforce Solutions, LLC, 297 F. Supp. 3d 1360, 1367 (N.D. Ga. Feb. 14, 2018) (rejecting attempt to extend Bristol-Myers to federal court FCRA action, noting federalism concerns did not apply); In re Chinese-Manufactured Drywall Prod. Liability Litigation, 2017 WL 5971622, at *16 (E.D. La. Nov. 30, 2017) ("BMS does not speak to or alter class action jurisprudence."); Fitzhenry-Russell v. Dr. Pepper Snapple Grp., Inc., 2017 WL 4224723, at *5 (N.D. Calif. September 22, 2017) (not extending Bristol-Myers to class actions, noting Bristol-Meyers was a mass tort action not a class action); Molock v. Whole Foods

[13] The joint status report, filed October 2, 2017 (after Bristol-Myers was decided), states: "The parties stipulate that the Court has personal jurisdiction over the parties." Doc. no. 31 at p. 2.

Market, Inc., 297 F. Supp. 3d 114, 126 (D. D.C. 2018) ("Bristol-Myers does not apply to class actions.").

B. Standards For Determining Certification

Plaintiff, as the party seeking class certification, has the burden of proof on all prerequisites to certification. Anderson Living Trust v. WPX Energy Production, LLC, 306 F.R.D. 312, 376 (10th Cir. 2015), citing authorities. Plaintiff has a strict burden to show that every aspect of Rule 23 is clearly met. Trevizo v. Adams, 455 F.3d 1155, 1162 (10th Cir. 2006); *and* s*ee*, General Telephone Co. of Southwest v. Falcon, 457 U.S. 147, 160 (1982) ("[A]ctual, not presumed, conformance with Rule 23(a) remains…indispensable.").

The first inquiry is whether the plaintiff can show the existence of the four threshold requirements of Rule 23(a). *Id.* The four requirements are: 1) numerosity, 2) commonality, 3) typicality, and 4) adequacy of the representative party. The district court must engage in its own "rigorous analysis" to decide whether these requirements are met. CGC Holding Co., LLC v. Broad and Cassel, 773 F.3d 1076, 1085 (10th Cir. 2014) (quoting Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 351 (2011)).

If the court determines that the four prerequisites of Rule 23(a) are satisfied, "'it must then examine whether the action falls within one of the three categories of suits set forth in Rule 23(b)." Shook v. El Paso County, 386 F.3d 963, 971 (10th Cir. 2004), quoting Adamson v. Bowen, 855 F.2d 668, 675 (10th Cir. 1988). Here, plaintiff seeks certification of a class under the third of these categories, per Rule 23(b)(3). Before a class action can be certified under Rule 23(b)(3), it is necessary for the court to find that: 1) "questions of law or fact common to the members of the class predominate over any questions affecting only individual members," and that 2) a class action is "superior to other available methods for the fair and efficient

adjudication of the controversy." Fed.R.Civ.P. 23(b)(3); Monreal v. Potter, 367 F.3d 1224, 1236-37 (10th Cir.2004).

"[T]he class determination generally involves considerations that are 'enmeshed in the factual and legal issues comprising [plaintiffs'] cause of action.'" Coopers & Lybrand v. Livesay, 437 U.S. 463, 469 (1978), quoting Mercantile Nat. Bank v. Langdeau, 371 U.S. 555, 558 (1963). The court's view of the merits – assuming that there is some basis for guessing at the merits at the class certification stage – should not influence the decision on class certification. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177 (1974). Nevertheless, the required rigorous analysis will frequently "entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped." Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 351, (2011).

Finally, whether to grant or deny certification of a class action under Rule 23 lies within the broad discretion of the district court. Reed v. Bowen, 849 F.2d 1307, 1309 (10th Cir.1988). The decision necessarily entails weighing the practical and prudential considerations raised by the facts unique to each case. *Id.* at 1309-1310.

C. Fed.R.Civ.P. 23(a) Requirements

1. Rule 23(a)(1) – Numerosity

Rule 23(a)(1) requires that "the class [be] so numerous that joinder of all members is impracticable." Although there is no magic number of members which would require class certification, classes of more than forty members have been deemed to satisfy the numerosity requirement. *See*, *e.g.*, Horn v. Associated Wholesale Grocers, Inc., 555 F.2d 270, 275-76 (10th Cir.1977) (class of 41 at time of filing, or 46 at time of trial, sufficient to warrant class certification). In evaluating numerosity, the court may also consider whether the proposed class members are geographically dispersed. Zeidman v. J. Ray McDermott & Co., 651 F.2d 1030, 1038 (5th Cir.1981).

In this case, the proposed class and subclass contain, respectively, 239,630 and 47,398 persons residing throughout the United States. *See*, motion, doc. no. 42 at p. 18; and doc. no. 42-2 at pp. 10-11, ¶¶ 32-33. Joinder of 239,630 and 47,398 class members residing throughout the United States would be impracticable. The numerosity requirement is satisfied -- a point which defendants, in any event, concede. Doc. no. 57, p. 15.

2. Rule 23(a)(2) – Commonality

Rule 23(a)(2) requires that "there are questions of law or fact common to the class." This is a low hurdle. Williams v. Mohawk Indus., Inc., 568 F.3d 1350, 1356 (11th Cir. 2009). Commonality requires only a single issue common to the class. J.B. ex rel. Hart v. Valdez, 186 F.3d 1280, 1288 (10th Cir.1999). The class claims must "depend upon a common contention … capable of classwide resolution -- which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011).

A core allegation with respect to count one is that calls using a prerecorded voice, in this case soundboard audio files, were placed to the proposed class members' residential telephone lines in an effort to market Northstar's home alarm systems. The technology in issue, called avatar or soundboard technology, involves humans who are purportedly listening in and who attempt to press computer buttons to generate a prerecorded response or a conversation which would be consistent with whatever the called party might have said. Doc. no. 67, TR at pp. 46-47.

Core allegations require determination of a number of common questions of fact and law, including: (1) whether the soundboard/avatar files used in the calls qualify as a "prerecorded voice" prohibited by the TCPA; (2) whether the calls constitute "telemarketing" under the FCC's rules; and (3) whether Northstar is liable for calls placed on its behalf through Yodel's system.

Defendants argue that factual variations in the calls raise individualized issues which prevent a finding of commonality. The court rejects that argument. Based on the evidence heard to date, it appears that all of the calls at issue delivered a prerecorded soundboard message. *See* doc. 67, TR at 84:14 – 91:2 (numerous measures taken to ensure that only calls which delivered a prerecorded soundboard message are included in the class). Whether the use of this technology violates the TCPA is common question for all of the calls in the proposed class. *See*, Margulis v. Eagle Health Advisors, LLC, 2016 WL 1258640 (E.D. Mo. 2016) (describing use of avatar technology and holding that these facts state a claim for relief under the TCPA).

Defendants also argue that common proof cannot show that all of the calls were to residential lines. Defendant argues, for example, that some of the numbers, including plaintiff's, may have been used for business purposes. Defendant has shown, for example, that plaintiff's number was included in the "Business Listing" section of an index of numbers complied by the Norman Chamber of Commerce. Doc. nos. 57-4, 57-5.[14]

The TCPA does not make an exception to its prohibition for calling telephone lines if the residential line is used for a home-based business or for another business purpose. Under other sections of the Act related to residential lines, such an exception has been rejected by the Federal Communications Commission. *See*, Rules and Regulations Implementing the TCPA, 70 FR 19330, 19331 (2005) ("We also decline to exempt from the do-not-call rules those calls made to 'home-based businesses….' "). Explicit Congressional findings accompanying the substantive

[14] The listings in question with respect to Braver, state "INDIVIDUALS" at the end of the listing. Doc. no. 57-4, p. 7, 11, 13; doc. no. 57-5, p. 2; doc. no. 57-6, p. 2. In addition, Braver testified that the phone number in question had been his residential phone number since his early teen years. Doc. no. 62-2, p. 91.

provisions of the TCPA itself state: "Banning such automated or prerecorded telephone calls to the home, except when the receiving party consents to receiving the call or when such calls are necessary in an emergency situation affecting the health and safety of the consumer, is the only effective means of protecting telephone consumers from this nuisance and privacy invasion." Public Law 102-243, § 2(12), 105 Stat. 2394 (1991) (note to 47 U.S.C. § 227).

The majority of courts to have considered this issue have concluded that factual questions related to personal use, as opposed to commercial use, do not prevent certification of consumer protection class actions. Yazzie v. Gurley Motor Co., 2015 WL 10818834, *5 (D. N. Mex. 2015). Moreover, if issues need to be tried to determine whether a line is a business line or a residential line, those issues could be resolved by asking class members whether the line in question is a residential line during the class notification process, or, in any event, through a standardized and efficient claims process at a later stage. *See*, *e.g.*, *id*. (issues regarding the consumer nature of the transaction could be resolved simply by asking class members about their vehicle use during class notification process).

There are questions of law or fact which are common to all members of the proposed class. The commonality requirement is satisfied.

3. Rule 23(a)(3) -- Typicality

Rule 23(a)(3) requires that the claims of the representative party be "typical of the claims ... of the class." The purpose of the typicality requirement is to assure that the interest of the named class representative aligns with the interests of the class. Hanon v. Dataproducts Corp., 976 F.2d 497, 508 (9th Cir.1992). Typicality refers to the nature of the claim of the class representative and not to the specific facts from which it arose or to the relief sought. *Id.* Factual differences will not render a claim atypical if the claim is based on the same legal or remedial theory and arises from the same events or course of conduct as do the claims of the class.

Adamson v. Bowen, 855 F.2d 668, 676 (10th Cir. 1988); Edgington v. R.G. Dickinson and Co., 139 F.R.D. 183, 189 (D.Kan.1991) (typicality ensures the class representative's claims resemble the class's claims to an extent that adequate representation can be expected; an important part of typicality is the inquiry into whether the representative's interests or claims are antagonistic or adverse to those of the class); A Aventura Chiropractic Center v. Med Waste Management, 2013 WL 3463489, *4 (S.D. Fla. 2013) ("A Aventura satisfies typicality as the course of conduct that produced its TCPA claim also produced the claims of the proposed class.")

Defendants argue that Braver's claim is not typical because his number was published by the Norman Chamber of Commerce. That argument is specious. The evidence shows quite clearly that defendants wanted to call residential telephone numbers and obtained Braver's number not from the Norman Chamber of Commerce but from Red Dot Data. The fact that Braver's number is included in a publication by the Norman Chamber of Commerce does not defeat typicality.

Braver's claim and the class members' claims arise from the same operative allegation: that without express written consent, a call was initiated, using a prerecorded voice, to Braver's and the class members' residential telephone lines, in an effort to market Northstar's home security systems, in violation of the TCPA. Braver's claim is typical of the class member's claims. The typicality requirement is satisfied.

4. Rule 23(a)(4) -- Adequacy

Rule 23(a)(4) requires that the representative party must "fairly and adequately protect the interests of the class." With regard to the adequacy requirement, two questions must be resolved: (1) do the named plaintiff and his counsel have any conflicts of interest with other class members? and (2) will the named plaintiff and his counsel prosecute the action vigorously on behalf of the

class? Rutter &Wilbanks Corp. v. Shell Oil Co., 314 F.3d 1180, 1187-1188 (10th Cir.2002). Thus, adequacy factors in potential conflicts of class counsel, and competency of class counsel. *Id.*, citing Amchem Prods, Inc. v. Windsor, 521 U.S. 591, 626, n.20 (1997).

No conflicts of interests have been identified and none are apparent here. Defendants do not dispute the competence of the proposed class counsel, and counsel are experienced litigators in civil cases, including in class actions. Braver's own experience in litigating TCPA matters and his knowledge of the TCPA speak to his ability to vigorously advocate on behalf of the class. His understanding of many of the technical aspects of this case, as was plainly evident at the hearing, is impressive. Furthermore, like every other class member, plaintiff has a claim for statutory damages and injunctive relief under the TCPA. *See*, 47 U.S.C. § 227(b)(3) (providing "$500 in damages for each such violation," injunctive relief, or both). These common interests support plaintiff's adequacy in this case.[15]

Defendants speculate that members of the class may not wish to pursue injunctive relief under the TCPA and would have a conflict with Braver, who stated in his deposition that injunctive relief was "not negotiable." This speculation does not create a conflict of interest or render Braver an inadequate class representative. An alleged conflict must be more than merely speculative or hypothetical; there must be a showing that the conflict is a real probability. *See*, *e.g.*, Robertson v. National Basketball Ass'n, 389 F. Supp. 867, 899 (S.D.N.Y.1975) (class action determination would not be denied absent a showing that the alleged potential conflicts were real

[15] There is a relationship between typicality and adequacy requirements. *See*, *e.g.*, Meyers v. Southwestern Bell Telephone Co., 181 F.R.D. 499, 501 (W.D. Okla. 1997) (typicality and adequacy are interrelated; if the representative claims are not typical of the class, they cannot adequately protect the interests of the absent class members).

probabilities and not "mere imaginative speculation"). Furthermore, the election of statutory damages and injunctive relief as remedies by Braver would benefit the members of the class. The interests of Braver align with the interests of the class; their interests are not antagonistic to each other.

Defendants argue that Braver is inadequate because he "will place his own interests above the class's and even abandon class claims altogether, if it suits his purposes." The evidence indicates otherwise. For example, defendants offered Braver a substantial sum of money to dismiss his claims in this case and abandon the class, which he rejected. Doc. no. 67, TR at 36. The court concludes that Braver can be relied upon to see to it that the interests of the class come first and that, for instance, if the case is to be settled, it is settled on a basis that provides substantial relief to his fellow class members (commensurate with the merits as they may appear at that juncture), rather than a pittance for the class members and a windfall for class counsel.

Defendants also argue that Braver has made a business of pursuing TCPA claims and has made money pursuing claims and lawsuits. Defendants argue that Braver chose to have his number removed from the national do not call registry years ago, so that Braver "chooses to receive telemarketing calls." Doc. no. 57, p. 11. The fact that Braver has previously pursued TCPA claims and lawsuits is not disqualifying. If defendants' argument regarding the do not call registry is intended to suggest that Braver consented to the calls so that he is disqualified, the court rejects that argument; taking one's name off the national do not call registry is not the same thing as consent.

Braver is a fair and adequate representative for the proposed class. The adequacy requirement of Rule 23(a)(4) is satisfied.

D. Fed.R.Civ.P. 23(b)(3) Requirements

1. Predominance

The predominance requirement is similar to but far more demanding than the commonality requirement of Rule 23(a). Amchem Products, 521 U.S. 591, 623-24. While commonality requires the presence of common questions of law and fact, Rule 23(b)(3) requires that "questions of law or fact common to class members predominate over any questions affecting only individual members." Fed.R.Civ.P. 23(b)(3). The "predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." Amchem Products, 521 U. S. 591, 623. In other words, the inquiry "asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues." Tyson Foods, Inc. v. Bouaphakeo, ___ U.S. ___, 136 S. Ct. 1036, 1045 (2016). "When one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members." *Id.* For the predominance requirement to be met, plaintiff's claims must stem from a "common nucleus of operative facts" and not have "material variations in elements." *See*, Esplin v. Hirschi, 402 F.2d 94, 99 (10th Cir. 1968); Edgington v. R. G. Dickinson and Co., 139 F.R.D. 183, 191 (D. Kan. 1991).

The elements of the TCPA claim in issue here are the initiation of (1) telemarketing calls (2) to any residential telephone line (3) using an artificial or prerecorded voice to deliver a message. 47 U.S.C. § 227(b)(1)(B); 47 C.F.R. §64.1200(a)(3). Class-wide evidence will determine each of these elements. For example, common evidence will show the purpose of the calls; a common legal question will be whether the purpose of the calls qualifies as telemarketing. *See*, 47

C.F.R. § 64.1200(f)(12) (definition of telemarketing). Similarly, common evidence is credibly predicted to show that every class member received a call using a soundboard voice. *See*, doc. no. 67, TR. at 84:14 – 91:2 (Robert Biggerstaff). A common question will be whether this qualifies as a prerecorded message under the Act.

Defendants make various arguments in an attempt to show that the predominance requirement has not been met. Below, the court addresses some of these arguments, all of which are rejected.

Defendants argue that class-wide evidence cannot identify calls that include live human voices; however, the fact that some calls may have included live voices, at some stage, does not defeat any of the elements of the claim.

Defendants argue that class-wide evidence cannot prove who was on the line during each call; however, the subscriber has statutory standing under the TCPA to bring a claim for calls made to that number regardless of whether he personally answered the call. As stated in Maraan v. DISH Network, L.L.C., 2014 WL 6603233 at *5 (S.D. Ohio 2014): "That Dr. Maraan did not answer the calls does not rob him of standing in this Court's view. He subscribed to a cellular telephone service on behalf of himself and other family members, a fairly typical and provider-encouraged scenario, and that status alone permits him to bring suit under the TCPA."[16] Arguments about who answered the phone do not defeat the predominance requirement.

Defendants argue that class-wide evidence cannot prove that the residential line requirement is met; however, common evidence shows that defendants intended

[16] Leyse v. Bank of Am. Nat'l Ass'n, 804 F.3d 316 (3d Cir. 2015), does not hold otherwise. That decision addressed whether other residents (*i.e.* non-subscribers) have standing. It held that even non-subscribers who reside within the household fall within the zone of interests of the act. *Id.* at 325-27.

to call, and did call, residential telephone numbers. Northstar is in the business of providing "security and home automation systems to home owners across most of the country." Doc. no. 69-1 at 23:9-11. It was for that reason that Northstar purchased a marketing list from Red Dot Data "for homeowners specifically," containing their landline telephone numbers. Doc. no. 42-4 at 18:2 -- 19:16; 25:2-6.[17] Arguments about Braver's phone number as it appeared in a Chamber of Commerce business listing are of negligible relevance here.

Defendants also argue that the issue of Northstar's vicarious liability for the calls requires individual inquiries into the belief of each class member with respect to whether Yodel was an agent of Northstar. The question of actual authority, however, depends upon the relationship and conduct between the defendants and requires no evidence from any consumer. Krakauer v. Dish Network L.L.C., 311 F.R.D. 384, 395 (M.D. N. Car. 2015). Thus, it is an issue which depends upon class-wide evidence. If plaintiff presents evidence sufficient for a jury to find actual authority, then any alleged individual issues regarding apparent authority or ratification will not predominate, as "it will not be necessary to reach apparent authority or ratification if [Plaintiff] and the class prevail on an actual authority theory." *Id.* at 396.

Furthermore, vicarious liability under theories of apparent authority and ratification are also subject to class-wide proof. Ratification depends on defendants' post-message behavior without concern for any conduct by the class members. Kristensen v. Credit Payment Servs., 12 F.Supp.3d 1292, 1306 (D. Nev. 2014); *see*

[17] Defendants argue that there is no list called the "Red Dot Data marketing list," the list referred to in the proposed class descriptions. However, as explained in the deposition testimony cited in the accompanying text (doc. no. 42-4 at p.18), a marketing list was compiled by Yodel from Flex Marketing Group, LLC, and Red Dot Data, LLC. *And see*, Kristensen v. Credit Payment Services, 12 F. Supp.3d 1292, 1303 (D. Nev. 2014) ("Data from T-Mobile calling lists can be used to identify the individual class members.").

also, Valle v. Global Exch. Vacation Club, 320 F.R.D. 50, 61 (C.D. Cal. 2017) (holding individual ratification issues do not predominate because "common question is whether Defendants ratified [] conduct by accepting customers [] sent to [it]"). Similarly, apparent authority depends on whether a reasonable person would believe that the caller had authority to act on behalf of Northstar. Kristensen, 12 F.Supp.3d at 1306. Because the inquiry is limited to how a reasonable person would perceive the calls at issue, there is no need to determine how individual class members perceived the calls. *See also*, Hawk Valley, Inc. v. Taylor, 301 F.R.D. 169, 188 (E.D. Pa. 2014) (certifying TCPA class and rejecting argument that individual issues regarding vicarious liability predominated).

As explained below, the court also rejects defendants' argument that individualized consent issues defeat the predominance requirement or otherwise defeat certification of a class.

Prior express written consent to the calls in question constitutes an affirmative defense. 47 U.S.C. §227(b)(1)(B); 47 C.F.R. § 64.1200(a)(3); Van Patten v. Vertical Fitness Group, 847 F.3d 1037, 1044 (9th Cir. 2017); Gupta v. E*Trade Bank, 2013 WL 12155220 at *2 (D. N. Mex. 2013) (citing a 2011 Ninth Circuit opinion, unpublished, and Breslow v. Wells Fargo Bank, N.A., 857 F. Supp.2d 1316, 1319 (S.D. Fla. 2012). Thus, these arguments go to a defense, not to an element of plaintiff's claim alleged in count one.

Furthermore, consent may be a common question in cases, such as this one, in which evidence shows defendants had no prior relationship with class members and that defendants purchased their telephone numbers from a third party. *See*, Gene v. Gene LLC v. BioPay LLC, 541 F.3d 318, 328 (5th Cir. 2008) ("whether the inclusion of the recipients' fax numbers in the purchased database indicated their consent to receive fax advertisements" was a common question and "there were therefore no questions of individual consent."); Hinman v. M & M Rental Ctr., 545

F.Supp.2d 802, 807 (N.D. Ill. 2008) ("M and M's fax broadcasts were transmitted *en masse* based on the 'leads' list compiled several years earlier. Under the circumstances, the question of consent may rightly be understood as a common question. . . . The possibility that some of the individuals on the list may separately have consented to the transmissions at issue is an insufficient basis for denying certification.").

In any event, defendants, to date, have presented no evidence of any written consent, making such a defense speculative (to be charitable about it).[18] Such a speculative defense does not defeat predominance. *See*, Del Valle v. Global Exchange Vacation Club, 320 F.R.D. 50, 61 (C.D.Cal., 2017) ("Defendants' speculation that customers may have given their consent to receive telemarketing calls . . . is not sufficient to defeat class certification -- especially where Plaintiff has offered persuasive evidence that [defendants do] not obtain express consent before cellular phone numbers are called by Defendants' vendors on their behalf."); Booth v. Appstack, Inc., 2015 WL 1466247, at *10–12 (W.D.Wash. 2015) ("in the absence of any affirmative evidence of consent, consent is a common issue with a common answer," citation omitted).

The court concludes that while it is conceivable consent issues might require determination separate from class-wide issues at a later stage, common issues (including common issues related to consent)[19] plainly predominate.

The predominance requirement is satisfied.

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[18] There was deposition testimony that Yodel told NorthStar the people called had "given consent" but that NorthStar did not inquire as to whether the people called had given their express written consent, signed, and expressly stating that they were consenting to receive prerecorded calls. Doc. no. 42-3, p. 171.

[19] For example, to the extent that a standardized consent document is ever identified, whether it meets the disclosure standard of 47 C.F.R. § 64.1200(f)(8) will be a common question.

2. Superiority

The superiority requirement of Rule 23(b)(3) ensures that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." The "class action device is frequently superior where proceeding individually would be difficult for class members with small claims." Belote v. Rivet Software, Inc., 2013 WL 2317243, *4 (D. Colo. 2013), paraphrasing Seijas v. Republic of Argentina, 606 F.3d 53, 58 (2d Cir. 2010). *See*, Mims v. Arrow Financial Services, LLC, 565 U.S. 368, 386 (2012) (recognizing that plaintiffs are unlikely to pay a $350 filing fee[20] to advance an individual TCPA claim for $500). A class action avoids this problem by aggregating what would otherwise be a series of "too small" potential individual recoveries. *See*, In re Checking Acct. Overdraft Litig., 286 F.R.D. 645, 659 (S.D. Fla. 2012) ("The class action fills an essential role when the plaintiffs would not have the incentive or resources to prosecute relatively small claims in individual suits, leaving the defendant free from legal accountability.")

The court also notes that, as a general proposition, class relief is potentially available for all claims, including minimum statutory damage claims, assuming there is no clear expression of congressional intent to exempt the claims from Rule 23. *See*, Califano v. Yamasaki, 442 U.S. 682, 700 (1979) ("[i]n the absence of a direct expression by Congress of its intent to depart from the usual course of trying 'all suits of a civil nature' under the [Federal] Rules [of Civil Procedure] established for that purpose, class relief is appropriate in civil actions brought in federal court...."). There is no express restriction of class relief with respect to claims under the TCPA. In addition, there is no incentive for suit created by any fee-shifting provision under the TCPA.

[20] The current filing fee in this court is $400.00.

Defendants argue that Braver's own past success in bringing individual claims indicates that class treatment is not superior. The court rejects this argument.

The circumstances of this action include: standardized conduct by the defendants, impacting numerous consumers who are geographically dispersed; a potential recovery by an individual consumer which is most likely too small to justify bringing an individual action; and evidence which indicates that defendants took steps to conceal their identity from the persons called, making it difficult for consumers to obtain the type of information that would permit them to pursue individual remedies. Given these circumstances, class action certification enables consumers to obtain a financial recovery (if legally and factually warranted) they might not have otherwise pursued on their own behalf, or which they might have been unable to pursue on their own behalf. At this juncture, the court does not perceive any insurmountable difficulties in managing a class action. For example, compliance with the notice requirements of Rule 23 should not pose a problem as defendants have records identifying the numbers called.

Class treatment will provide the fairest and most efficient adjudication of the alleged violations of the TCPA. The superiority requirement of Rule 23(b)(3) is satisfied.

E. The Class Definitions: Ascertainability

Although not enumerated in Rule 23, some courts require that a class definition be "precise, objective, and presently ascertainable." Lavigne v. First Community Bancshares, Inc., 2018 WL 2694457, *6 (D. N.Mex. June 5, 2018) (certifying TCPA class).

The Tenth Circuit has not spoken on this requirement and several circuits have rejected it. *See*, City Select Auto Sales, Inc. v. BMW Bank of North America, Inc., 867 F.3d 434, 443 (3d Cir. 2017) (concurring opinion notes that the Second, Sixth, Seventh and Ninth Circuits have rejected this requirement and argues that the Third

Circuit should do so as well; in City Select, the majority reversed the district court's denial of certification). Nevertheless, district courts within this circuit have applied a standard of ascertainability which requires: first, that the class be defined with reference to objective criteria; and second, a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition. *See*, *e.g.*, In re: Cox Enterprises, Inc. Set-Top Cable Television Box Antitrust Litigation, 2014 WL 104964, *2 (W.D. Okla. Jan. 9, 2014), citing Hayes v. Wal-Mart Stores, Inc., 725 F.3d 349, 355 (3d Cir. 2013).

Here, the proposed class definitions are precise and objective. Phone numbers, names, and addresses of class members appear in the documents of Red Dot Data. The ascertainability requirement is generally satisfied where such business records can be used to identify the class. *See e.g.*, AA Suncoast Chiropractic Clinic, P.A. v. Progressive Am. Ins. Co., 321 F.R.D. 677, 684 (M.D. Fla. 2017) ("Defendants' records, data, and electronic systems . . . satisfy the objective criteria necessary to ascertain the class members. . . . The inquiry does not require a highly individualized assessment of the insureds because [certain information] . . . is readily accessible from Defendants' files.").

A list of telephone numbers that fall within the class definition satisfies the ascertainability requirement, and here there is additional contact information on top of that, available in the data. *See*, Sandusky Wellness Center, LLC v. Medtox Sci., Inc., 821 F.3d 992, 997 (8th Cir. 2016) (finding, in a TCPA case, that "fax logs showing the numbers that received each fax are objective criteria that make the recipient clearly ascertainable"); American Copper & Brass v. Lake City Industrial Products, Inc., 757 F.3d 540 (6th Cir. 2014) ("the fax numbers are objective data satisfying the ascertainability requirement."); Birchmeier v. Caribbean Cruise Line, Inc., 302 F.R.D. 240, 248 (N.D. Ill. 2014) ("it is fairly clear that the identities of the persons whose numbers are on plaintiffs' list of 930,000 -- indeed, the subscribers

for those numbers at the time defendants called them -- are sufficiently ascertainable"); Kristensen v. Credit Payment Services, 12 F.Supp.3d 1292, 1303 (D. Nev. 2014) ("Data from T-Mobile calling lists can be used to identify the individual class members. Prospective plaintiffs can readily identify themselves as class members based on receipt of the text message."); Palm Beach Golf Center-Boca, Inc. v. Sarris, 311 F.R.D. 688, 692, 694 (S.D. Fla. 2015) (report indicated there was an error-free transmission of a one-page fax to 7,058 unique fax numbers on certain dates; court stated, "The proposed class definition here is similar to those approved by numerous courts in other B2B TCPA class actions. The majority of courts to consider the issue have concluded that such a definition, supported by a report like the Biggerstaff report prepared for this case, satisfies Rule 23's implicit ascertainability and administrative feasibility requirement.").

Defendants argue that a class is not sufficiently definite if it includes persons who have no claim because, for example, no prerecorded message was played in certain situations, making it necessary to listen to each of the calls to identify proper class members. Defendants argue it would not be administratively feasible to identify class members by this method, which means that the class is not sufficiently ascertainable. Defendants have offered no evidence to show that the proposed class includes individuals to whom no prerecorded message was played, and plaintiff's proposed class and evidence makes such situations extremely unlikely. For example, the length of the call which is used to define the proposed class (calls lasting 30 seconds) would eliminate situations in which a called person hung up before the prerecorded message was played. Furthermore, if it should prove necessary, these types of concerns could be addressed by a claims procedure after the major, common issues are determined on a class-wide basis.

Defendants argue that ascertainability has not been shown because there may be some class members who have no claim because they did not personally answer

the phone when their number was dialed. The court rejects this contention because, as previously explained, the subscriber to a particular phone number has standing without regard to whether he answered the call in question.

Defendants also argue that ascertainability concerns are raised because the class is an improperly defined "fail safe" class. Defendants cite Taylor v. Universal Auto Group I, Inc., 2014 WL 6654270, at *22 (W.D.Wash.,2014) (inclusion of the "without prior consent" language in the national classes definition makes it a fail safe class; rather than deny certification, court provided plaintiff with an opportunity to refine the class definition). The class definitions proposed by the plaintiff are not defined in terms of consent, and there is no fail safe problem.

Ascertainability requirements are satisfied.

IV. Class Certification

After careful consideration, the court finds and concludes that plaintiff has satisfied the requirements of Rule 23(a) and Rule 23(b)(3). This case is well-suited to adjudication under Rule 23. Plaintiff's motion for class certification is, accordingly, **GRANTED**. Doc. no. 42.

As proposed by the plaintiff, the following class and subclass are **CERTIFIED** with respect to count one of the first amended complaint.

> Class:
>
> All persons in the Red Dot Data marketing list for whom Yodel's records reflect a telephone call regarding Northstar's home security systems that lasted more than 30 seconds, that was handled by an agent who applied status code 20 or 50 to the call, and that resulted in the normal clearing disposition.

> Subclass:
>
> All persons in the Red Dot Data marketing list for whom Yodel's records reflect a telephone call regarding Northstar's home security systems that lasted more than 30 seconds, that was handled by an agent who applied status code 50 to the call, and that resulted in the normal clearing disposition.

Excluded from the class are:

Any persons whose contact information is associated with either an IP address or website URL in the Red Dot Data marketing list.

V. Schedule

The parties are **DIRECTED** to confer with a view to filing a jointly proposed schedule which addresses the timing of notice to the class, as well as the timing of any pre-trial motions or other pre-trial matters that will require the court to rule. The jointly proposed schedule **SHALL** also inform the court of plaintiff's position regarding the status of count three of the first amended complaint. The jointly proposed schedule is **DUE** within thirty days of the date of this order. After review of the jointly proposed schedule, the court will determine whether it is necessary to hold another scheduling conference at this stage. If the parties are unable to agree on a jointly proposed schedule, they shall so notify the court within thirty-one days of the date of this order.

IT IS SO ORDERED this 15th day of October, 2018.

STEPHEN P. FRIOT
UNITED STATES DISTRICT JUDGE

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FTC 2016 Staff Opinion Letter on Soundboard Technology

UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

Lois C. Greisman
Associate Director
Division of Marketing Practices

November 10, 2016

Michael Bills
132 S 600 East, Suite 204
Salt Lake City, UT 84102

Re: September 11, 2009 Staff Opinion Letter on Soundboard Technology

Dear Mr. Bills:

We are writing to you regarding the informal staff opinion letter we provided to your former company, Call Assistant, LLC, on September 11, 2009. [1] Our September 2009 letter responded to Call Assistant's inquiry regarding whether the Telemarketing Sales Rule's ("TSR") provisions governing outbound telemarketing calls that deliver prerecorded messages[2] apply to calls utilizing soundboard technology, which is technology that allows a live agent to communicate with a call recipient by playing recorded audio snippets instead of using his or her own live voice. In the September 2009 letter, staff stated its opinion that the technology, as described by Call Assistant, would not be subject to the prerecorded message provisions of the TSR. Staff's opinion was based on important features that Call Assistant highlighted about its technology – i.e., that for the entire duration of a call made using the technology, a single live agent stays with the call from beginning to end, listens to every word spoken by the call recipient, determines what is heard by the call recipient, and has the ability to interrupt recordings and use his or her own voice to communicate with the call recipient if needed. In our view at that time, these features made the calls "virtually indistinguishable" from normal two-way conversations with live operators and placed them outside the scope of the TSR's prerecorded message provisions.

Since the issuance of our September 2009 letter, staff has received a steadily increasing volume of formal and informal complaints from consumers about telemarketing calls utilizing soundboard technology. Consumers complain that during these calls they are not receiving appropriate recorded responses to their questions or comments. Consumers further complain that often no live telemarketer intervenes to provide a human response when requested to do so, the recorded audio snippets that are played do not adequately address consumer questions, or the call

[1] A copy of the September 11, 2009 staff opinion letter can be found at http://www.ftc.gov/sites/default/files/documents/advisory_opinions/opinion-09-1/opinion0901_1.pdf. Call Assistant, LLC, filed for Chapter 7 bankruptcy on August 13, 2015. *In re Call Assistant LLC*, Case No. 15-11708 (KJC) (Bankr. D. Del. Aug. 13, 2015).

[2] 16 C.F.R. § 310.4(b)(1)(v).

is terminated in response to consumers questions. Indeed, media reports also have taken note of this phenomenon, which some in the press have dubbed telemarketing "robot" calls.[3] Simply put, since we issued the letter in 2009, staff has seen evidence of the widespread use of soundboard technology in a manner that does not represent a normal, continuous, two-way conversation between the call recipient and a live person. This is inconsistent with the principles we laid out in our September 2009 letter as well as our understanding of the technology at the time we issued the letter.[4] Moreover, this type of use does not provide the consumer benefits upon which we based our September 2009 opinion.

In response to rising complaints and concerns, staff reached out to the Professional Association for Customer Engagement ("PACE"), which is a trade association representing call centers, and the Soundboard Association, a trade organization representing manufacturers and users of soundboard technology. During the last few months, we have had multiple productive discussions and meetings with PACE and the Soundboard Association to learn more about soundboard technology and obtain industry input regarding the regulatory status of that technology. Both PACE and the Soundboard Association were responsive to requests, provided meaningful input to assist staff in its review of this technology, and highlighted the potential benefits of responsible soundboard use. Staff carefully considered the input of PACE and the Soundboard Association.

A fundamental premise of our September 2009 letter was that soundboard technology was a surrogate for the live agent's actual voice. A human being cannot conduct separate conversations with multiple consumers at the same time using his or her own voice. Nonetheless, some companies are routinely using soundboard technology in precisely this manner, and these companies are improperly using our September 2009 letter to justify their actions in court proceedings[5] and in investigations. Indeed, Call Assistant noted publicly that

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[3] *See, e.g.*., Sean Gallagher, *The New Spam: Interactive Robo-Calls From the Cloud as Cheap as E-Mail*, ARS TECHNICA, (Apr. 15, 2015), http://arstechnica.com/information-technology/2015/04/the-new-spam-interactive-robo-calls-from-the-cloud-as-cheap-as-e-mail; Alexis C. Madrigal, *Almost Human: The Surreal, Cyborg Future of Telemarketing*, THE ATLANTIC, (Dec. 20, 2013), http://www.theatlantic.com/technology/archive/2013/12/almost-human-the-surreal-cyborg-future-of-telemarketing/282537/; Alexis C. Madrigal, *The Only Thing Weirder Than a Telemarketing Robot*, THE ATLANTIC, (Dec. 13, 2013), http://www.theatlantic.com/technology/archive/2013/12/the-only-thing-weirder-than-a-telemarketing-robot/282282/; Zeke Miller & Denver Nicks, *Meet the Robot Telemarketer Who Denies She's a Robot*, TIME, (Dec. 10, 2013), http://newsfeed.time.com/2013/12/10/meet-the-robot-telemarketer-who-denies-shes-a-robot/; Kris Hundley, *These Telemarketers Never Stray From Script*, TAMPA BAY TIMES, (Nov. 14, 2013), http://www.tampabay.com/news/these-telemarketers-never-stray-from-the-script/2152303.

[4] For example, Call Assistant highlighted the ability of its agents to use their own voices during calls using its soundboard technology: "Our technology merely substitutes sound files for the agent's voice (*although the agent can interject with his or her voice at any time*) . . . ." (emphasis supplied). *See also* September 2009 Letter at 1 ("In response to the greeting, the agent may elect to speak to the call recipient *using his or her voice*, or may press a button to play an appropriate recorded script segment. . . . At all times, even during the playing of a recorded segment, *the agent retains the power to interrupt any recorded message to listen to the consumer and respond appropriately*.") (emphasis supplied).

[5] *See, e.g., Fitzhenry v. ADT Corp.*, No. 9:14-CV-80180 (S.D. Fla.); *Barrett v. ADT Corp.*, No. 12:15-CV-1348 (S.D. Ohio).

one of the advantages of its technology is that "an agent can conduct multiple calls simultaneously."[6] Staff also has seen evidence that call centers are using soundboard technology to increase the number of outbound calls they can make. In addition, in our discussions and meetings, industry representatives acknowledged that call centers routinely use soundboard technology to allow a single live agent to handle more than one call at the same time.

The plain language of the TSR provision governing prerecorded calls imposes restrictions on "any outbound telephone call that delivers a prerecorded message."[7] It is indisputable that calls made using soundboard technology deliver prerecorded messages. As such, under the plain meaning of the words in the TSR's prerecorded call provision, outbound telemarketing calls using soundboard technology are covered because such calls "deliver a prerecorded message."[8]

Given the actual language used in the TSR, the increasing volume of consumer complaints, and all the abuses we have seen since we issued the September 2009 letter, we have decided to revoke the September 2009 letter. It is now staff's opinion that outbound telemarketing calls that utilize soundboard technology are subject to the TSR's prerecorded call provisions because such calls do, in fact, "deliver a prerecorded message" as set forth in the plain language of the rule.[9] Accordingly, outbound telemarketing calls made using soundboard technology are subject to the provisions of 16 C.F.R. § 310.4(b)(1)(v), and can only be made legally if they comply with the requirements set forth in Section 310.4(b)(1)(v)(A) (for calls selling goods or services), Section 310.4(b)(1)(v)(B) (for calls seeking charitable contributions from members or prior donors), or Section 310.4(b)(1)(v)(D) (healthcare messages by a covered entity or its business associate under HIPAA).

In reaching this conclusion, staff did consider whether an express requirement that live agents using soundboard technology only handle one call at a time would change the analysis. Staff has concluded that it would not. First, even with a 1-to-1 limitation in place, such calls would still "deliver a prerecorded message" and therefore would fall within the plain language of 16 C.F.R. 310.4(b)(1)(v). Moreover, in staff's view, a 1-to-1 limitation would not stop abusive use of the technology. Based on preliminary information provided by industry representatives, a significant percentage of the total number of call center seats utilizing soundboard technology are used to make telemarketing or lead generation calls. A 1-to-1 limitation would allow a lead generation operation to use soundboard technology in which live operators simply press a button to play a prerecorded message offering a good or service that asks the consumer to say "yes" or press 1 on their phone if they are interested. If the consumer says yes or presses 1, the live agent would then transfer the call to the seller who makes a telemarketing pitch. Such calls are indistinguishable from standard lead generation robocalls that are governed by the TSR and are the subject of a large volume of consumer complaints and significant telemarketing abuse. The

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[6] *Nougar, L.C., et al. v. Revocalize, LLC, et al.*, No. 2:11-cv-127, DE 41 (D. Utah, Oct. 18, 2011).

[7] 16 C.F.R. § 310.4(b)(1)(v).

[8] *Id.*

[9] *Id.* Staff notes that representatives of both PACE and the Soundboard Association disagree with this conclusion.

fact that a live operator, instead of a computer, "delivers" the prerecorded message and transfers interested consumers to sellers makes little difference from the call recipient's perspective. Thus, even a 1-to-1 limitation would permit soundboard technology to be used to deliver calls that are indistinguishable from the telemarketing robocalls that consumers consider to be abusive and that are illegal under the TSR.

Finally, staff does recognize that when the Commission adopted the TSR's robocall provisions TSR in 2008, it foresaw that technology could evolve to allow the use of interactive prerecorded messages in telemarketing calls in a manner "essentially indistinguishable from conversing with a human being."[10] Indeed, soundboard technology, when used properly, may one day approach that level of proficiency. If and when such advances occur, the Commission noted that parties could seek further amendment of the TSR or exemptions from the prerecorded message provisions.[11]

In order to give industry sufficient time to make any necessary changes to bring themselves into compliance, the revocation of the September 2009 letter will be effective six months from today, on May 12, 2017. As of that date, the September 11, 2009 letter will no longer represent the opinions of FTC staff and cannot be used, relied upon, or cited for any purpose.

In closing, staff notes that revocation of the September 2009 opinion letter does not mean that the TSR prohibits all calls made using soundboard technology. To the contrary, call centers can still use soundboard technology for in-bound calls and to place a wide variety of outbound calls, such as non-telemarketing calls (e.g., political calls, survey calls, and pure informational calls), telemarketing calls that fall within the exemptions set forth in Section 310.4(B)(1)(v)(A), (B), or (D), certain types of charitable donation calls, and calls that are expressly exempt from the TSR under Section 310.6 (e.g., business-to-business calls). In fact, the preliminary data provided indicates that a significant percentage of call center seats that utilize soundboard technology are used for in-bound calls or to place non-telemarketing calls, such as political or charitable calls. As long as those calls remain outside the scope of the TSR, companies can continue to use soundboard technology for those types of calls without violating the TSR. Please note, however, that we do not opine on whether the use of such technology complies with state or other federal laws, including the Telephone Consumer Protection Act, 47 U.S.C. § 227, or its corresponding regulations implemented by the Federal Communications Commission, 47 C.F.R. § 64.1200.

Please be advised that the views expressed in this letter are those of the FTC staff, subject to the limitations in 16 C.F.R. § 1.3. They have not been approved or adopted by the Commission, and they are not binding upon the Commission. However, they do reflect the views of staff members charged with enforcement of the TSR.

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[10] *Telemarketing Sales Rule*, 73 Fed. Reg. 51,164, 51,1180 (Aug. 29, 2008).

[11] *Id.* ("Accordingly, nothing in this notice should be interpreted to foreclose the possibility of petitions seeking further amendment of the TSR or exemptions from the provisions adopted here.")

Sincerely,

Lois C. Greisman
Associate Director
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